and/or tapping the said estate belonging to the testator and that there was no income at all.

6. I am advised and verily believe that I am not a person chargeable with tax as prescribed in Section 68(1) of the Income Tax Ordinance and notwithstanding the facts deposed to in paragraph 5 herein, the Comptroller of Income Tax proceeded to assess under the section based on a wrong notion and opinion."

I do not consider that the facts as stated above amount to a valid defence to the action because the applicant failed to avail himself of the provisions of the Income Tax Ordinance, 1947, which gave the right of appeal to any person aggrieved by any assessment made upon him; in default of any such appeal the assessment is final and conclusive, and this Court is not free to re-open the assessment. In *Allen v. Sharp*[2], Parke J., at p. 366, stated: "An assessment not appealed from stands precisely in the same situation as one confirmed after appeal." This statement has been quoted with approval by Avory J., in *Rex v. Bloomsbury Income Tax Commissioners*[3] at 790 — see also *Rex v. Swansea Income Tax Commissioner*[4].

In the course of the argument the learned counsel for the applicant also submitted that the defendant was not liable to pay income tax because the assessment which was purported to be made under section 68(3) of the Income Tax Ordinance was not served on the defendant as required by section 72 of the Ordinance. There is no allegation of this fact in the affidavit in support of the application, but the learned Counsel relied on statements contained in letters referred and attached to the affidavit. Now while the affidavit proves the fact that those letters have been sent or received, it does not prove the truth of the contents of those letters. That fact, therefore, cannot be taken into consideration. But even assuming that notice of assessment was not served on the defendant as alleged, the defendant must have had knowledge of that assessment before judgment was entered against him and he had ample opportunity of contesting the assessment by appeal or by other means available by law before the judgment was signed.

For the above reasons, the application is rejected with costs.

Application rejected.

Re KOH SEK LIM, DECD. THE PUBLIC TRUSTEE v. KOH KONG WAN & ANOR.

[O. C. J. (Whyatt C.J.) January 17, 1957]

[Singapore — Originating Summons No. 96 of 1956]

Settled Estates Ordinance (Cap. 20), s. 27 — Power to order rents or payments reserved under a lease or any part of such rents or payments to be applied for capital purposes — Whether mine is an open mine.

This was an application by the Public Trustee, as trustee of the Will of Koh Sek Lim deceased. The Public Trustee asked for authority to grant leases over an area of 15 acres of land belonging to the estate of the deceased for the purpose of removing building sand and for directions as to the application of the royalties received from such leases as between life-tenants and remaindermen. It appeared that at the time of the deceased's death one sand pit on the land had been worked.

Held: (1) as the sandpit had been worked in the lifetime of the deceased the mine was an open mine and therefore under the common law the life tenants have the right to the proceeds obtained from working it, whether the workings were from the old pit or from new pits;

(2) section 27 of the Settled Estates Ordinance gives power to the Court where it authorises a running lease to order part of the royalties received under the lease to be applied to any of the four capital purposes prescribed in that section.

Cases referred to:—

(1) *Campbell v. Wardlaw* 8 App. Cas. 645.

(2) *Greville-Nugent v. Mackenzie* (1900) A.C. 83.

(3) *Earl Cowley v. Wellesley* 35 Beav. 635.

(4) *Elias v. Snowden Slate Quarries Co.* 4 App. Cas. 454.

(5) *In Re Maynards Settled Estate* (1899) 2 Ch. 347.

ORIGINATING SUMMONS.

W. G. Alcock (*A. W. Ghows* with him) for the plaintiff.

P. F. de Souza (*Nancy Yeap* with him) for the life-tenants.

Wee Chong Jin for the remaindermen.

Whyatt C.J. : — This summons was issued by the Public Trustee, as trustee of the will of Koh Sek Lim, for the purpose of obtaining the decision of the Court on certain questions which have arisen in connexion with the administration of the trusts of the will, and for the purpose of these proceedings Koh Kong Wan, the son of the testator, was appointed to represent the interests of the tenants for life, and Harry Koh Teck Hin to represent the interests of the remaindermen. The facts, so far as they are material, may be summarised as follows. In 1924 the testator purchased a parcel of land, known as the Gulega Bedok Estate, which at that time comprised 536 acres. Substantial portions of the estate were subsequently purchased by the Crown under compulsory powers and the area now held by the trustee of the will is only 192 acres. Of this approximately 90 acres is suitable for building; the remaining area is very valuable as it contains extensive deposits of building sand which have produced large

revenues in the past and seem likely to be able to produce even larger revenues in the future.

For twenty years or more prior to his death in 1948 the testator had been digging sand from pits in this area and selling it to building contractors. In 1925 and 1926, there were only two pits, in 1930 and the following years four more pits were dug, and in 1945 immediately after the Japanese occupation, another pit was started, making a total of seven pits in all. The sketch plan exhibited to the affidavit of Koh Kong Wan, the representative of the life-tenants, shows that these pits are not concentrated in one particular part of the estate but are fairly evenly distributed throughout the area. It would appear, therefore, that the sand deposit extends over the greater part of the estate and this is confirmed by a recent mineral survey which the Public Trustee, with commendable foresight, arranged to be carried out on the estate. Some 20 bore-holes were sunk to an average depth of 30 feet and in every instance deposits of sand were encountered, varying in thickness from 13 feet to 30 feet, which was the depth at which boring stopped. Indeed the impression conveyed by the plan prepared by the mining surveyors is that no matter where a person decided to dig in this area he would very likely encounter valuable deposits of sand.

At the time of the testator's death in 1948 only one sand-pit was being worked. It was a large pit and was leased to George Wimpey & Co. Ltd., building contractors, for a term of years expiring in 1951. After the determination of Wimpey's lease, the Public Trustee granted in 1954 a further lease over substantially the same area to a person named, Loh Fook Kong for a period which will expire in January 1960. No question was raised by counsel for the life-tenants or the remaindermen as to whether the Public Trustee had power to grant this lease without obtaining the prior approval of the Court under the Settled Estates Ordinance and accordingly for present purposes, I proceed on the basis that the royalties paid to the Public Trustee by Loh Fook Kong are to be dealt with under the general law without reference to that Ordinance. The position, therefore, is that there is at the present time one large sand pit being worked on this estate and the first question I have to decide is whether the royalties amounting to $114,200 which have been received by the Public Trustee from Wimpeys and Loh Fook Kong since the death of the testator from this pit should be treated as income and paid to the life-tenants or treated as capital for the benefit of the remaindermen.

The principles to be applied in determining the rights at common law of life-tenants and remaindermen in the produce of mines have long been settled and apply equally where the workings are on the surface, as in the case of quarries and sand pits, as they do to subterranean workings. Lord Blackburn pointed out in *Campbell v. Wardlaw*[1] that there is a difference in the nature of things between produce from the land which is annually reaped and replaces itself, and minerals, which once taken from the land, are never replaced. On a strict view, the former would go to the life-tenant and the latter to the remainderman but from the earliest times, as long ago as the 14th century, this view has been modified so as to allow a life-tenant to work and retain the produce of mines which were already opened when he came into possession, the reason being that there was supposed to be an irresistible indication of intention that he who conveyed the property for a limited time to a person with a limited interest intended him to work the opened minerals. Hence it is often said that the question whether a mine is open or not is a question of intention. No doubt the intention can be evidenced in the instrument of conveyance and in various other ways but where the mine has been worked and the produce sold, there can be no doubt whatever that the mine is an open mine. Now in the present case the testator leased the sand pit to Wimpey and Co. Ltd. in 1946 and it was being actively worked by Wimpeys when he died in August 1948. It follows, therefore, it was an open mine at that date when the interest of the life-tenants vested under the will and consequently they are entitled to the profits of this open sand pit. It is true that subsequently there was an interval of two or three years after Wimpey's lease expired in 1951 before a fresh lease was granted to Loh Fook Kong in 1954 during which the sand pit was not being worked but the decision of the House of Lords in *Greville-Nugent v. Mackenzie*[2] clearly establishes that a mine does not cease to be an open mine merely because the working of it is suspended for a time. Accordingly, therefore, I reach the conclusion that the sum of $114,200 from royalties paid to the Public Trustee in respect of the working of this sand-pit since the testator's death should be paid to the life-tenants.

It remains to consider the further question whether the digging of new sand-pits or the renewed working of old sand-pits in this area would be, in law, commencing new mines or merely, as one learned Judge described it, pursuing the same vein. Fortunately guidance is to be found on this question in the case of *Earl Cowley v. Wellesley*[3]. That was a case where there was gravel under some waste land which was gotten by pits on the surface, each pit being separate. The question arose whether working a new pit was a continuation of the working of the old mine and the Master of the Rolls, Lord Romilly, said, "The whole of the gravel or sand on the waste land must be treated

as a mine and each gravel pit as if it were a fresh pit on the mine." That case was approved in *Elias v Snowden Slate Quarries Co.*[4] and in *In re Maynards Settled Estate*[5] where Kekewich J., commenting on Lord Romilly's *dictum,* said: "In each case the owner working the gravel is doing what King L. C. called 'pursuing' the vein. He does not pursue it inch by inch through the soil, but opens it by attacking the vein from another place; but he is still working the vein which is situate in the waste." In my view these words would be very apt to describe the operations of a person who digs fresh pits in this area. The mineral survey carried out on behalf of the Public Trustee shows clearly that there is a continuous deposit of sand throughout the area, and therefore any person digging a pit in a place different from that now being worked by Loh Fook Kong would not be opening a new mine but would merely be getting sand from the same mine by a different means of access. The test is not whether the pit or the shaft is new but whether the mine is old in the sense that it is a mine which has already been discovered and opened by previous workings. In my judgment this is an open mine and therefore under the general law the life-tenants have the right to the proceeds obtained from working it, whether or not the workings consist of one pit or many.

I now turn to consider how far, if at all, the rights of the life-tenants to receive the profits of this mine may be affected by statute. Although the position at common law is that tenants for life are entitled to the whole of the royalties from an open mine this was modified in England by the Settled Estates Act 1877 which provided that where the Court authorised a mineral lease of a settled estate, it should, as a condition of doing so, direct that a quarter of the royalties should be accumulated for the benefit of the remaindermen where the life-tenant was entitled to work the mine for his own benefit, and three quarters where he was not so entitled. The principle that tenants for life are not to receive the whole of the royalties from minerals was re-affirmed in the Settled Land Acts 1882 to 1890 and was re-stated in the Settled Land Act 1925.

The corresponding enactment in Singapore is the Settled Estates Ordinance but as counsel for the remaindermen pointed out, although this Ordinance is based upon the Settled Estates Act 1877 there are some very important differences. The Singapore Ordinance gives power to the Court in section 5, to authorise a mining lease but it contains no provision similar to that in section 4 of the English Act, requiring a portion of the royalties — one-quarter or three-quarters according as the life-tenant is or is not entitled at common law to work the mine — to be set aside and invested. Notwithstanding this omission, it contains in section 27 provisions similar to those in section 34 of the English Act relating to the application of the moneys which have been set aside. The provisions of section 34 of the English Act are, of course, consequential on the mandatory provision in section 4 requiring a portion of the royalties to be set aside and it is anomalous, to say the least, to find in the Singapore Ordinance, a provision which should likewise be consequential but is not, because the substantive provision requiring a portion of the royalties to be set aside has been omitted. Counsel for the remaindermen contended, however, that section 27 of the Singapore Ordinance could stand by itself and maintained that, upon a true construction, it gave the Court authority to order the rents or payments reserved under a lease, or any part of such rents or payments, to be applied to any of the four capital purposes set out at the end of the section. It is to be observed that section 27 of the Singapore Ordinance deals not only with rents or payments reserved under a lease but also with any part of such rents or payments. The English Act, on the other hand, provides in section 4 that a certain portion of the whole rent or payment reserved under the lease shall be set aside (which is another and rather longer way of saying that a part of the rents and payments shall be set aside) and subsequently in section 34 provides that all the moneys so set aside shall be applied to capital purposes. In other words, if section 4 and section 34 of the English Act are read together, the provisions in the latter section mean that a part of the rent or payments reserved under a lease — a fixed part of one quarter or three quarters according to circumstances — shall be applied to capital purposes. This result is, therefore, very much the same as that which is obtained in section 27 of the Singapore Ordinance by the use of the words "any part of such rents or payments reserved under a lease," the chief difference being that in the Singapore Ordinance, the part is not predetermined and fixed by an earlier section and the application to capital purposes is permissive and not mandatory. To put the matter another way, the Singapore provisions are more elliptical than those in the English Act, (which may well be due to the fact that the draftsman of the Singapore Ordinance, while using the English Act as a model, did not wish to reproduce it in every detail) but for present purposes their scope is similar. In my opinion the policy of the two enactments is the same, namely, to give the Court power to authorise mining leases of settled land and at the same time to limit the sweeping common law rule that a tenant for life receives the whole of the royalties from minerals won from an open mine. Consequently I reach the conclusion that section 27 of the Settled Estates Ordinance should be construed to mean that where the Court has authorised a mining lease under

this Ordinance it has power, to order part of the royalties received under the lease to be applied to any of the four capital pruposes prescribed in that section.

In the present case the Public Trustee seeks authority to grant leases over an area of 15 acres on terms indicated in a document containing Heads of Agreement exhibited to his affidavit, and directions as to the application of the royalties received from such leases as between life-tenants and remaindermen. As I have already said this was an open mine at the time of the testator's death and has been an open mine ever since and therefore it seems to me proper that the Public Trustee should be authorised by the Court to grant leases on the terms indicated in the Heads of Agreement to ensure its continued working. For the reasons I have mentioned, I am satisfied that the Court has power to direct that part of the royalties received from such leases should be applied to capital purposes and since the usual proportion where the amounts are prescribed by statute in England is one fourth for capital purposes and three quarters for the life-tenants, where the lease is of an open mine, I think it would be appropriate if I order that in this case one quarter of the royalties should be applied to the capital purposes prescribed in section 27 of the Settled Estates Ordinance. The parties will have liberty to apply to the Court from time to time for the purpose of obtaining further detailed directions for carrying out this order.

In addition to seeking authority for the grant of mining leases, the Public Trustee also asks for authority to grant building leases for a term of seventy years on that part of the Gulega Bedok Estate which has a frontage on Changi Road and Bedok Road. This application was supported by counsel for the life-tenants and by counsel for the remaindermen and I am satisfied, after considering the evidence on the matter, that it would be proper and in the interests of all concerned to authorise such building leases. The whole of the rents received from such leases should be paid to the life-tenants.

The costs of all parties to these proceedings as between solicitor and client, will come out of the trust estate.

Order accordingly.

Solicitors : *de Souza & de Souza; Wee Swee Teow & Co.*

Re TAN TYE DECD.; ESTATE & TRUST AGENCIES (1927) LTD. v. TAN LIAN CHYE & ORS.

[O. C. J. (Chua J.) April 25, 1957]

[Singapore — Originating Summons No. 147 of 1956]

Trust — Prohibition in will of sale of immovable property — Jurisdiction of Court to approve sale — Scope of the Court's jurisdiction — Opposition of beneficiaries to sale — Trustees Ordinance (Cap. 34), s. 56.

This Originating Summons was taken out in the Matter of the Trusts of the Will of Tan Tye deceased, the plaintiffs (a Trust Company) being the Trustees and the defendants being parties interested under the will to the income of the estate. The Summons asked for an order, (a) that the plaintiffs be at liberty to sell the land and premises of the estate consisting of two pieces of land situate in the District of Geylang (hereinafter referred to as the Trust Property), containing 4 acres 2 roods 16 poles and 2 acres 3 roods 36 poles respectively, for the sum of $2,000,000 and for that purpose to confirm the provisional agreement for sale dated the 19th day of November 1956 entered into between the plaintiffs and Happy World Limited (hereinafter referred to as the Agreement); (b) that, in the event of the above order being granted, the costs of all parties be taxed as between solicitors and clients and paid out of the proceeds of sale, or out of the estate; (c) that the net proceeds be invested by the plaintiffs in the purchase of immovable property in Singapore or in the security of freehold or leasehold property in Singapore in accordance with directions as to investment expressed in the said Will; (d) that the plaintiffs be paid a remuneration for their work in connection with and incidental to the said sale to be fixed by the Court out of the proceeds of sale.

The said Tan Tye (hereinafter called the Testator) made his will dated May 13, 1896 and after making certain bequests gave the residue to his trustees to hold upon the trusts therein stated. The trustees were directed, after applying the income for certain specified purposes, to divide the balance of the income into ten equal shares and to pay one such share equally among the Testator's children, grandchildren and nephews named in the will. The trustees were directed to apply the property and the income thereof "upon the trusts aforesaid until the expiration of the period of twenty-one years from the decease of the survivor of such of my children and grandchildren and my abovenamed nephews as shall be living at my decease. At the expiration of which period subject to the trusts aforesaid I direct my trustees or trustee to divide the whole of my property among all such of my male issue (not including adopted male) as shall then be living in equal shares *per capita*." The Will not only did not give the trustees power to sell immovable property but expressly prohibited such sale until the date of distribution.

The last surviving life whereby the period of the Trusts was limited was the first defendant, Tan Lian Chye, a son of the Testator, who was a very old man. Twenty-one years after the death of Tan Lian Chye, the Trust Property must be sold and the proceeds divided according to the Trusts. Part of the property comprised